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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 208

THE TRAVELERS INSURANCE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 16–20) is reported at 6 T. C. 753. The opinion of the Circuit Court of Appeals (R. 33–38) is reported at 161 F. 2d 93.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 15, 1947 (R. 39). The petition for a writ of certiorari was filed on July 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer's liability, under Section 311 of the Internal Revenue Code as transferee, for income tax owed by a corporation in which the taxpayer held stock, is barred under the principle of *res judicata* by two previous decisions which adjudicated different claims not involving transferee liability.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 311. TRANSFERRED ASSETS.
>
> (a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> (1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.
>
> * * * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(f) *Definition of "transferee".*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. (26 U. S. C. 1940, ed., Sec. 311.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.311–1. *Claims in cases of transferred assets.*—The amount for which a transferee of the property of a taxpayer is liable, at law or in equity, and the amount of the personal liability of a fiduciary under section 3467 of the Revised Statutes, as amended, in respect of any income tax imposed by chapter 1 (paragraph 81 of the Appendix to these regulations), whether shown on the return of the taxpayer or determined as a deficiency in the tax, shall be assessed against such transferee or such fiduciary, as the case may be, and collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by chapter 1, except as hereinafter provided. * * *

The term "transferee" as used in this section includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation,

the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees.

* * * * *

STATEMENT

The facts were found by the Tax Court (R. 17) as stipulated (R. 26–30), and, as stated by the Tax Court (R. 17–18), the material facts may be summarized as follows:

Prior to 1896, the taxpayer, a Connecticut corporation, acquired 2,000 shares of the outstanding 50,000 shares of capital stock of the Northwestern Telegraph Company (hereinafter referred to as "Northwestern") and since that time has held continuously, and now owns, the 2,000 shares of Northwestern stock (R. 17).

Prior to July 1, 1881, Northwestern, a Wisconsin corporation, operated a telegraph business in some States of the United States and Canada. On May 7, 1881, it leased to The Western Union Telegraph Company (hereinafter referred to as "Western Union") all of its assets and property for a term of 99 years, and, following execution of the lease, Western Union took possession of all its properties and has since used and operated them. By the terms of the lease, Western Union obligated itself to pay the rentals specified in the

lease [1] directly to the stockholders and bondholders of Northwestern. After taking possession of the property, it placed on each certificate of Northwestern's stock, including those held by the taxpayer, an endorsement evidencing its obligation to pay dividends to the owner of the stock in the amounts provided in the lease (R. 17–18).

In both 1940 and 1941, Western Union paid to the Northwestern stockholders the amounts provided by the lease. In each of these years, the taxpayer, as owner of 2,000 shares of Northwestern stock, received the amount of $6,000 from Western Union, the payment representing six percent of the par value of this stock. (R. 18.)

For each of the years 1940 and 1941, Northwestern filed an income tax return, reporting an income tax of $36,012.24 due for 1940 and a tax of $46,265.81 due for 1941. The taxes were computed upon a gross income consisting of the payments made by Western Union to Northwestern stockholders in each year under the lease agreement. No part of the tax reported on these returns was paid. After execution of the lease, Northwestern was without property in its posses-

[1] The annual rentals for the property under the terms of the lease were $150,000 for the year ending July 1, 1896, and for each year thereafter, including the years 1940 and 1941 (R. 28).

sion from which it could satisfy its liability for federal income taxes for 1940 and 1941. On February 16, 1944, the United States obtained judgment against Northwestern in the United States District Court for the District of Connecticut, for delinquent federal income taxes and interest in the total amount of $286,445.49. This judgment included the amounts of $36,012.24 and $46,265.81 owed by Northwestern for the taxable years 1940 and 1941. The judgment was not appealed and has become final. Execution thereon was duly issued and returned unsatisfied and no part of the judgment has been paid. (R. 17–18.)

On March 13, 1945, the Commissioner issued a deficiency letter to the taxpayer, in which he determined that the taxpayer was liable as a transferee for income taxes due from Northwestern for the years 1940 and 1941 to the extent of $6,000, plus interest threon, for each year (R. 7–8). From this determination taxpayer appealed to the Tax Court, contending only that prior decisions in *United States* v. *Western Union Telegraph Co.,* 19 F. 2d 157 (S. D. N. Y.), affirmed 50 F. 2d 102 (C. C. A. 2d), and in *United States* v. *Western Union Telegraph Co.,* 52 F. Supp. 553 (S. D. N. Y.), dismissed August 28, 1944 (C. C. A. 2d), were *res judicata* of the taxpayer's transferee liability in this case (R. 18–19).

The Tax Court held that the prior decisions relied on by the taxpayer were not *res judicata* as

to its transferee liability and found that the taxpayer was liable as a transferee of assets for $6,000, plus interest, of the unpaid income tax of Northwestern for each of the years 1940 and 1941 (R. 19–20, 21). The Circuit Court of Appeals affirmed (R. 33–38).

ARGUMENT

Both the lower court and the Tax Court found that the issue of the stockholders' transferee liability for taxes due from their corporation, to the extent of the annual dividends received by them directly from their corporation's lessee, was not raised, litigated, or determined in either of the two previous decisions which the taxpayer contends operate here as an estoppel by judgment, i. e., *United States* v. *Western Union Telegraph Co.*, 19 F. 2d 157 (S. D. N. Y.), affirmed, 50 F. 2d 102 (C. C. A. 2d), and *United States* v. *Western Union Telegraph Co.*, 52 F. Supp. 553 (S. D. N. Y.), appeal dismissed August 28, 1944 (C. C. A. 2d).[2] A reading of these cases confirms the conclusion that the question of transferee liability was not there litigated or determined. Since the present case is concerned solely with

[2] In the first case, the Northwestern stockholders (presumably including the taxpayer here) were made nominal parties, not because any relief was sought against them, as the District Court pointed out (19 F. 2d at 159), but because their right to receive the rents payable under the lease might be affected by a determination of the case. Apparently Northwestern, but not its stockholders, was a party defendant in the case at 52 F. Supp. 553.

the transferee liability of one stockholder and since it concededly involves a different claim or demand from those asserted in the two previous cases, the judgments in the two previous cases did not foreclose decision of this case on its merits.[3] *Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353; *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620. The taxpayer's contention (Pet. 6) that the lower court misconstrued and misapplied the *Cromwell* and *Tait* cases is thus not sustainable.

The taxpayer's argument seems to be that even though the transferee liability was not directly in issue in the two previous cases, those judgments are conclusive here on the theory that they determined the ownership of the rents under the lease, which it contends is the fundamental fact decisive of transferee liability (Pet. 7–12). In addition to the fact, which alone defeats the plea of *res judicata,* that the transferee issue was not presented and decided in the prior cases, the opin-

[3] On the merits, the taxpayer has not questioned that the rents paid directly to Northwestern's stockholders were taxable income to Northwestern (see United States v. *Joliet & Chicago R. Co.*, 315 U. S. 44, and *United States* v. *Northwestern Telegraph Co.*, 83 F. 2d 468 (C. C. A. 2d)), and that the Northwestern stockholders receive the rents each year as current dividends from Northwestern; as a result they are transferees within Section 311 of the Internal Revenue Code, *supra*, and liable for its taxes for each year to the extent of the dividends received (see *Commissioner* v. *Western Union Tel. Co.*, 141 F. 2d 774 (C. C. A. 2d), certiorari denied, 322 U. S. 751).

ions in the earlier cases did not undertake to decide Northwestern's property interest in the rents beyond the point required to dispose of the precise issues before the courts.[4] Indeed, both the district and the appellate courts in the first case expressly limited their language with respect to Northwestern's property rights to the lien question there at issue. As pointed out (footnote 4), the second earlier decision has no greater scope than does the first one. Consequently, the decisions cannot be construed as an adjudication that Northwestern had no property rights in the rents for other purposes, and specifically that it had no "constructive" ownership (R. 38) sufficient to support transferee liability on the part of its stockholders. Even if the language of the previous decisions had attempted a broad determination of property rights, it would be dictum insofar as it was unnecessary in determining the lien

[4] The issues in the first suit (see 19 F. 2d 157) were whether the United States had a lien on the annual rents for taxes due from Northwestern and whether it could enjoin Western Union from paying them to the Northwestern stockholders. The second suit was to restrain Western Union from paying the rents to the Northwestern stockholders and to compel the application of the rents to payment of Northwestern's income taxes (see 52 F. Supp. 553). In that suit, the district court did not decide the issues on the merits but on the ground that the first suit was *res judicata* of all issues; thus its scope is no broader than the judgment in the first suit. The absence of an adjudication on the merits is a further reason why the second earlier judgment is not *res judicata* of the present case. See *Cromwell* v. *County of Sac*, *supra*, p. 352; *Tait* v. *Western Md. Ry. Co.*, *supra*, p. 623.

and injunction questions, and the dictum would not be accorded *res judicata* effect. *The Evergreens* v. *Nunan,* 141 F. 2d 927 (C. C. A. 2d), certiorari denied, 323 U. S. 720.

The judgment of the lower court was correct for a further reason. A previous decision may be treated as *res judicata* of a later case only where the "questions presented upon the facts and the law are essentially the same." *Blair* v. *Commissioner,* 300 U. S. 5, 9. See, also, *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620. Here the question upon the law is not the same. Section 311 of the Internal Revenue Code is the statute controlling the transferee issue in this case, but this section, or its earlier counterpart, was not applicable to, and was not employed in deciding, the issues in the previous cases.

CONCLUSION

The judgment below is correct and does not conflict with any decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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